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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 521.

S. S. "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant,
Petitioner,

—against—

THE RHEINSTROM BROTHERS COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

D. ROGER ENGLAR,
Counsel for Respondent.

HENRY N. LONGLEY,
F. HERBERT PREM,
Of Counsel.

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Steamship "ANSALDO SAN GIORGIO I", SOCIETA NAZIONALE DI NAVIGAZIONE, Claimant,

Petitioner,

—against—

THE RHEINSTROM BROTHERS COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This is the petitioner's second application for a writ of certiorari in this case. The previous application for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit on the question of liability was denied by this Court in 1928, 278 U. S. 633, 49 S. Ct. 31. Thereafter, the damages were fixed by a commissioner who found that the respondent's merchandise, consisting of 4266 barrels of cherries in brine, had sustained extensive damage, whereby many barrels became worthless and others lost a considerable part of their contents. The evidence was that about one-quarter of the barrels were damaged, and

> "that the brine had leaked out of the barrels and the fruit rotted; and that a large quantity

> of cherries, and broken and crushed barrel staves were found lying on the floor of the compartment" (Report of Commissioner, R., pp. 236-7).

A considerable number of barrels were wholly missing (R., p. 244, fol. 732).

Both the District Court and the Circuit Court of Appeals supported all the findings of the commissioner as to the extent of the damage.

It appeared, however, that owing to favorable market conditions prevailing at destination, the total market value of the merchandise which remained in specie, taking the sound and damaged together, exceeded the values stated in the invoices under which the goods were shipped. Under these circumstances the District Court held that the respondent was barred from any recovery under the following clause in the bill of lading:

> "11. In the event of claims for loss, damage or short delivery, the same shall be adjusted on the basis of the invoice value of the entire shipment, adding expenses necessarily incurred" (Opinion of District Court, R., p. 252).

The shipper was given no choice of rates, and did not have an opportunity to ship at a higher freight rate under which the carrier's liability would be unlimited.

The Circuit Court of Appeals reversed the decree of the District Court, and directed that the respondent recover in accordance with the commissioner's report. It is this decision which this Court is asked to review in the present proceeding.

POINT I.

The clause is void as unreasonable.

The results of the bill of lading clause above quoted are readily apparent. If one hundred units of merchandise are shipped and only fifty are delivered, the carrier is under no liability whatever if the merchandise happens to be worth twice as much at destination as at the port of shipment. On the other hand, if the market value has fallen 50%, the carrier will be liable for half the invoice value of the entire shipment if even one unit has sustained a trifling damage.

The petitioner argues that this gambling element renders the clause reasonable; that the cargo-owner should be willing to stake his actual damages, in one class of cases (where the market rises), against the chance of winning, in another class (where the market falls), something to which he has no logical or moral claim. In considering the reasonableness of the clause, it will be noted at the outset that the odds are very strongly in favor of the carrier; for the movement of cargo is based on the fact that it is worth more at destination than at the port of shipment. Cases where the opposite is true, are highly exceptional. The fatal objection to the clause, however, is that, in a case like the present, it gives the carrier complete exemption from liability for the negligent destruction of property in its custody. This Court has never upheld any valuation or limitation clause under which a common carrier could wholly escape liability for the physical destruction of cargo in its custody, due to its negligence. Indeed, we have found no case in which any court has sustained such a clause; the early decisions are to the contrary, and

we think the present is the first case in which their authority has been questioned. *Pearse* v. *Quebec S. S. Co.*, 24 Fed. 285, 287-8-9 (S. D. N. Y.); *Morrison* v. *I. & V. Florio S. S. Co.*, 36 Fed. 569, 571 (D. C. N. J.). See also *Ruppel* v. *Allegheny Valley R. R. Co.*, 31 Atlantic Reporter 478, 480 (Sup. Ct., Penn.).

We, therefore, submit that the Circuit Court of Appeals correctly decided that the clause above quoted is unreasonable and void.

POINT II.

The clause is invalid because the shipper was given no choice of rates.

We submit that the clause is invalid on another ground which the Circuit Court of Appeals mentioned, but did not pass upon. The clause undertakes to fix a conventional valuation for the property shipped, without giving the shipper the alternative of holding the carrier to its common law liability in consideration of a higher freight rate. This a common carrier is not permitted to do, quite apart from the question whether the proposed valuation is reasonable.

So far from being novel or doubtful, this question was passed upon and we believe definitely settled by this Court as late as 1920, in the most specific and positive terms. *Union Pacific Railroad Company* v. *Burke*, 255 U. S. 317, 41 S. Ct. 283. In the *Burke* case the petitioner made exactly the same argument which the petitioner makes here, *i. e.*, that the shipper need not have a choice of rates provided the valuation clause be reasonable (see Petitioner's Brief,

p. 16). After explaining the theory on which valuation clauses have been sustained, this Court said:

> "The petitioner admits all this, but contends that it has never been held by this Court that such choice of rates was essential to the validity of valuation agreements, and, arguing that they should be sustained unless shown to have been fraudulently or oppressively obtained, it affirms the validity of the agreement in the Yokohama bill of lading, and cites as a decisive authority *Reid* v. *American Express Co.*, 241 U. S. 544.
>
> "With this contention we cannot agree.
>
> "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants (112 U. S. 331, 338 and 246 U. S. 439, 444, *supra*), and valuation agreements have been sustained only on principles of estoppel and in carefully restricted cases where choice of rates was given—where 'the rate was tied to the release' " (p. 321).
>
> * * * * * * * *
>
> "Thus this valuation rule, where choice is given to and accepted by a shipper, is, in effect, an exception to the common-law rule of liability of common carriers, and the latter rule remains in full effect as to all cases not falling within the scope of such exception" (pp. 322-3).

In view of this language we deem it unnecessary to indulge in an elaborate discussion of the decisions in the various State courts. There is some conflict in the State court decisions, but the law is now settled in the Federal courts that a common carrier cannot cut down his common law liability except by a con-

tract which the shipper voluntarily accepts in consideration of a reduced rate of freight. In the present case the shipper had no choice in the matter, and the only consideration which the carrier claims to have given him is a purely speculative benefit which he may or may not have desired.

CONCLUSION.

We submit that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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Counsel for Respondent.

HENRY N. LONGLEY,
F. HERBERT PREM,
Of Counsel.

New York, November 21, 1934.